No. 92-8556

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

KENNETH O. NICHOLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly considered petitioner's prior, uncounseled misdemeanor conviction in determining petitioner's sentence.

2. Whether the sentencing court properly considered evidence that had been illegally seized in connection with a prior, unrelated drug transaction by petitioner.

3. Whether the district court properly increased petitioner's offense level under the Sentencing Guidelines based on his accomplice's use of a firearm during the charged offense.

4. Whether the district court properly considered an uncompleted drug transaction in determining petitioner's offense level under the Guidelines.

5. Whether the district court properly refused to award petitioner credit for acceptance of responsibility under the Guidelines.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-31, is reported at 979 F.2d 402. The opinion of the district court on sentencing is reported at 763 F. Supp. 277.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1992. A petition for rehearing was denied on February 16, 1993. The petition for a writ of certiorari was filed on April 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After his plea of guilty in the United States District Court for the Eastern District of Tennessee to conspiracy to possess

cocaine with intent to distribute it, in violation of 21 U.S.C. 846, petitioner was sentenced to 235 months' imprisonment and eight years' supervised release. The court of appeals affirmed. Pet. App. 1-31.

1. In March 1990, petitioner and Ronald Harkins agreed to negotiate a purchase of five kilograms of cocaine from federal undercover agents posing as cocaine suppliers. Petitioner showed Harkins a box full of cash, directed Harkins to meet with the undercover agents, and told him to bring back a kilogram of cocaine for testing. When the agents refused to give Harkins the kilogram of cocaine for testing, Harkins telephoned petitioner, who told him to call off the deal. Pet. App. 3.

In September 1990, petitioner and Harkins decided to negotiate a purchase of three kilograms of cocaine for $65,000 with the undercover agents. Harkins was to bring back one kilogram of cocaine for testing, and if it tested positive, Harkins was to return to buy the remaining two kilograms. Meanwhile, petitioner was to remain at a location known only to him and Harkins. On September 21, 1990, before the meeting with the agents, Harkins asked petitioner whether he should carry a firearm. Petitioner told him to use his discretion. Harkins arrived at the meeting place, where federal agents promptly arrested him and seized a loaded firearm from him. Shortly afterwards, other agents arrested petitioner as he was emerging from a wooded area, heading toward his truck. The agents seized $40,000 in cash

hidden in a nearby tree stump. They also seized a shoulder holster from petitioner's truck. Pet. App. 3.

2. The presentence investigation report assessed petitioner one criminal history point for a 1983 state misdemeanor conviction for driving under the influence of alcohol (DUI), for which petitioner was fined $250 but was not incarcerated. Petitioner objected to the inclusion of that conviction in computing his criminal history score because he had not been represented by counsel in that case. The district court noted that petitioner did not have counsel at his DUI trial. Although observing that the evidence on the issue of whether petitioner had waived counsel was unclear, the court held that a waiver of counsel could not be presumed from a silent record. Nonetheless, the court held that petitioner's uncounseled misdemeanor conviction was properly included in his criminal history score and that reliance on that conviction did not violate Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam). United States v. Nichols, 763 F. Supp. 277, 278-280 (E.D. Tenn. 1991).

In sentencing petitioner at the top of the applicable Sentencing Guidelines range, the district court made reference to a drug crime committed by petitioner in 1988. The court found that in 1988, state law enforcement agents learned through court-authorized electronic surveillance that petitioner was supplying cocaine to a local drug dealer. The agents observed petitioner deliver a white bag to the drug dealer and receive something in exchange. The agents then seized cocaine, loaded weapons, and a

false-bottom oil can from petitioner's truck and $2,800 from petitioner's pocket. The Georgia state courts, however, suppressed the items seized from the truck and from petitioner's person. Petitioner was not convicted of any crime relating to his 1988 arrest. United States v. Nichols, 763 F. Supp. at 280.

Based on those findings, the district court held that the evidence was sufficiently reliable to show that petitioner was involved in a drug transaction in 1988. The court stated:

> This Court is convinced by a preponderance of the evidence that a drug transaction did occur there--despite some of the evidence having been suppressed and despite the absence of a conviction of the defendant. The Court can make this determination without really considering the suppressed real evidence. Nevertheless, the Court, * * * may consider this evidence which does lend added ballast to the Court's factual conclusions.

763 F. Supp. at 281. The court refused to depart upward from the Guidelines range, but stated that it "will utilize the defendant's 1988 other criminal conduct to sentence the defendant at the top of his guideline range at 235 months." Ibid.

The district court also increased petitioner's offense level by two levels for possession of a firearm, under Sentencing Guidelines § 2D1.1(b)(1), and considered petitioner's involvement in the uncompleted five-kilogram cocaine transaction in March 1990 under Guidelines § 1B1.3(a) and § 2D1.4. The court refused to decrease petitioner's offense level by two levels for acceptance of responsibility under Guidelines § 3E1.1, because petitioner refused to admit that he was involved in the uncompleted March 1990 drug deal. Pet. App. 18-22.

3. The court of appeals affirmed. The court held that the district court had properly considered petitioner's uncounseled misdemeanor DUI conviction in computing petitioner's criminal history score under the Sentencing Guidelines and that to consider that conviction for sentencing purposes did not violate Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam).[1] Pet. App. 23-29.

The court of appeals also held that the district court properly considered the evidence that was illegally seized during petitioner's arrest for an unrelated drug transaction in 1988 in determining the point in his Guidelines range at which to impose sentence. The court indicated that, if the evidence had been seized in connection with the offense for which petitioner was being sentenced, the deterrent purposes of the exclusionary rule would be furthered by applying it in proceedings under the Sentencing Guidelines. Pet. App. 13-16. The court held, however, that because the illegal seizure had occurred in connection with a prior, unrelated offense, the costs of applying the exclusionary rule would be substantial and would provide only limited deterrence to unconstitutional law enforcement practices. Accordingly, the court held that "where evidence is illegally seized in relation to conduct that does not fall within the relevant conduct provisions of the sentencing guidelines, and the

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[1] Judge Jones dissented from that holding and expressed the view that Baldasar precludes the use of a defendant's prior uncounseled misdemeanor conviction to enhance a subsequent sentence. Pet. App. 4-10.

district court does not otherwise rely on the evidence in determining the defendant's sentence, the court may consider such evidence in determining where to sentence the defendant within the recommended guideline range."[2] Id. at 17.

The court of appeals also held that the district court properly computed petitioner's offense level. First, it held that petitioner's offense level was correctly adjusted upward for possession of a firearm, because petitioner could reasonably foresee that Harkins would use a firearm during the drug deal. The court noted that petitioner had previously purchased firearms from Harkins and that he had told Harkins to use his discretion when Harkins asked him about taking a firearm to the meeting with the agents. Pet. App. 18-19.

Second, the court of appeals upheld the district court's consideration of the uncompleted March 1990 drug transaction in increasing petitioner's offense level. The court noted that the March 1990 attempted sale was part of the same course of conduct as the charged transaction; that petitioner had the money and intended to buy the cocaine; and that petitioner called off the deal only when the agents refused to give Harkins a kilogram of cocaine for testing. Pet. App. 19-22.

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[2] Judge Nelson separately concurred in the judgment on that issue, but disassociated himself from "some of the dicta that accompany the court's" holding. Pet. App. 30. Judge Nelson refrained from addressing the broader issue of whether the exclusionary rule may apply in some other sentencing context, because the court's "disposition of the appeal makes it unnecessary" to reach that issue. Ibid.

Finally, the court of appeals upheld the district court's refusal to award petitioner a two-level credit for acceptance of responsibility under Sentencing Guidelines § 3E1.1. The court held that petitioner did not fully accept responsibility for his criminal conduct, because he refused to admit that he attempted to purchase cocaine from the agents in March 1990. Pet. App. 22.

ARGUMENT

1. Petitioner contends (Pet. 14-20) that the district court's consideration of his prior, uncounseled misdemeanor conviction in imposing sentence conflicts with this Court's decision in Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam). There is no merit to that claim.

The Sentencing Guidelines require the inclusion of certain uncounseled misdemeanor convictions in calculating a defendant's criminal history. See Sentencing Guidelines §§ 4A1.1(c), 4A1.2(c), (d), and (e); Guidelines § 4A1.2, Application Note 6 & Background.[3] Those prior offenses can raise a defendant's criminal history score by up to four points, see Guidelines § 4A1.1(c), and thus can increase his criminal history category

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[3] Petitioner errs in contending (Pet. 15) that the Guidelines in effect at the time of his offense in 1989 barred any use of an uncounseled misdemeanor conviction. As noted by the court of appeals, Pet. App. 5-6, the 1989 version of the Guidelines authorized the use of an uncounseled misdemeanor conviction unless such use would violate the Constitution. Because the Constitution permits a court to enhance a subsequent sentence based on an uncounseled misdemeanor conviction when that conviction is itself constitutionally valid (in that it did not result in incarceration), the 1989 Guidelines also permitted that use.

by up to two levels. That, in turn, may result in an enhanced sentencing range.

The use of an uncounseled misdemeanor conviction not resulting in incarceration to compute a defendant's criminal history score is consistent with the decisions of this Court. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court held that a State may not imprison an indigent defendant for a petty offense unless he has been offered appointed counsel at trial. In Scott v. Illinois, 440 U.S. 367 (1979), however, the court limited Argersinger to cases in which the defendant had actually been imprisoned after conviction, and refused to extend it to cases in which imprisonment was authorized by statute but not imposed.

In Baldasar v. Illinois, 446 U.S. 222 (1980) (per curiam), the Court held that an uncounseled misdemeanor conviction could not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony carrying a prison term. The Court did not agree on a single rationale for that result. Justice Stewart, joined by Justices Brennan and Stevens, concurred on the ground that the defendant had been sentenced to an increased term of imprisonment only because he had been convicted of a prior offense for which he did not have counsel, and that the sentence was therefore invalid under Scott v. Illinois. 446 U.S. at 224. Justice Marshall, joined by Justices Brennan and Stevens, concurred in the result on the ground that "a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes

of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." Id. at 228. Justice Blackmun concurred in the result on the ground (rejected in Scott) that the defendant's prior, uncounseled conviction was per se invalid because it was for an offense punishable by more than six months' imprisonment and that such an invalid conviction could not be used for enhancement purposes. Id. at 229-230.[4]

The issue in Baldasar differs from the issue here. In this case, the sentencing court used an uncounseled DUI conviction to determine a criminal history category for a crime that was already a felony; it was not used, as in Baldasar, to enhance a misdemeanor into a felony. Accordingly, Baldasar's precise holding does not control this case. Accord United States v. Follin, 979 F.2d 369, 375-376 (5th Cir. 1992), petition for cert. pending, No. 92-8216. And, because of the splintered rationale for the judgment in Baldasar, other courts of appeals have confined that decision to its facts and have held that it is permissible to include an uncounseled misdemeanor conviction in computing a criminal history score. See United States v. Follin, supra; United States v. Castro-Vega, 945 F.2d 496, 499-500 (2d Cir. 1991), cert. denied, 113 S. Ct. 1250 (1993); United States v. Eckford, 910 F.2d 216 (5th Cir. 1990). See also United States

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[4] In dissent, Justice Powell, joined by Chief Justice Burger and Justices White and Rehnquist, reasoned that Baldasar was being imprisoned for a second offense, not for his uncounseled misdemeanor, and that a valid misdemeanor conviction could constitutionally be used to enhance Baldasar's sentence. 446 U.S. at 230-235.

v. Peagler, 847 F.2d 756, 757-758 (11th Cir. 1988) (upholding district court's use of valid uncounseled misdemeanor convictions in considering character issues in sentencing for a subsequent offense); Schindler v. Clerk of Circuit Court, 715 F.2d 341, 345 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984).[5]

In addition, although Argersinger, Scott, and Baldasar all involved the right of an indigent defendant to appointed counsel, petitioner has never claimed that he was indigent at the time of his prior DUI conviction. Instead, petitioner's theory appears to be that because the government did not establish a valid waiver of counsel in the prior case, his uncounseled conviction cannot be used to enhance his sentence. In Parke v. Raley, 113 S. Ct. 517 (1992), however, this Court stated that when a prior conviction is collaterally attacked in a recidivist sentencing proceeding, the prior conviction is subject to a "presumption of regularity," id. at 523, even when the question is whether the defendant had waived a constitutional right, id. at 524. The Court thus held that the Due Process Clause permits a court to

[5] The decision in United States v. Brady, 928 F.2d 844, 852-854 (9th Cir. 1991), does not conflict with the decision in this case. There, the court of appeals stated in an alternative holding that it was impermissible to increase a Guidelines sentence based on uncounseled tribal court misdemeanor convictions. The tribal court sentences involved in that case, however, were fine-or-imprisonment sentences, id. at 853, and thus the convictions were arguably invalid under Scott. Here, petitioner's prior conviction did not provide for imprisonment. Moreover, the discussion of Baldasar in Brady was dictum, because the court of appeals had previously ruled that the prior tribal sentences were too minor to justify an enhancement of the criminal history score under the Sentencing Guidelines. 928 F.2d at 853.

presume that the prior conviction is constitutionally valid and to require the defendant to carry the burden of proving the contrary. Id. at 523-526.

It follows that when a prior conviction is offered for sentence enhancement and the defendant challenges it on constitutional grounds, the conviction is presumed valid, even if the record is silent on issues such as the circumstances underlying an uncounseled conviction. Parke, 113 S. Ct. at 525 (noting with approval the practice of the courts of appeals in "allocat[ing] the full burden of proof to defendants claiming that an invalid guilty plea renders a prior conviction unavailable for purposes of calculating criminal history under the Sentencing Guidelines"); Application Note 6 to Sentencing Guidelines § 4A1.2 ("[S]entences resulting from convictions that a defendant shows to have been previously ruled constitutionally invalid are not to be counted.") (emphasis added).

Although the district court in this case decided the waiver issue against the government on the ground that waiver "cannot be presumed from a silent record," United States v. Nichols, 763 Supp. at 278, that approach is inconsistent with Parke. The district court's error in allocating the burden of proof to the government takes on added force in light of the court of appeals' observation that "[i]n point of fact, [petitioner] may well have waived his right to counsel in the DUI proceeding."[6] Pet. App.

[6] The court noted that petitioner "told the probation officer who prepared the presentence report here 'that he had contacted an attorney and had been informed by that attorney that

24 n.1. Because petitioner did not establish the preliminary issue of his indigence at the time of the prior proceeding, and the district court erroneously allocated the burden of proof to the government in deciding the issue of waiver, this is not an appropriate case for resolving the application of Baldasar to uncounseled misdemeanor convictions in the context of the Sentencing Guidelines.

2. Petitioner also contends (Pet. 21-26) that the district court erred in considering the evidence that had been illegally seized in 1988 in determining his sentence. He maintains that the Fourth Amendment's exclusionary rule applies at sentencing proceedings.

As an initial matter, it does not appear that the district court relied on the illegally seized evidence. The court stated that it found by a preponderance of the evidence that petitioner had engaged in criminal conduct in 1988, and that it could "make this determination without really considering the suppressed . . . evidence." Pet. App. 10 n.2. Because the district court went on to state that it "may consider this [suppressed] evidence which does lend added ballast to the Court's factual conclusions," the court of appeals concluded that the sentencing court had actually relied on the illegally seized evidence. Ibid.

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he did not need to be represented at the [misdemeanor] hearing, since he would be pleading nolo contendere." Pet. App. 24 n.1. There is no indication that the attorney petitioner contacted was a public defender or appointed counsel, and there is no indication that petitioner lacked funds to retain counsel if he had seen fit to do so.

That conclusion is incorrect; the clear import of the district court's explanation is that, although the suppressed evidence corroborated its conclusion about petitioner's 1988 conduct, the evidence was not essential to its conclusion.[7] Accordingly, there is no reason to believe that, if this Court were to review the judgment below and to hold that the illegally seized evidence could not be considered at sentencing, it would lead to a different sentence for petitioner.

In any event, the court of appeals correctly held that the evidence was not subject to the exclusionary rule. The exclusionary rule does not vindicate an aggrieved individual's Fourth Amendment rights, but serves as a judicially fashioned remedy to deter future police misconduct. United States v. Calandra, 414 U.S. 338, 347-348 (1974). This Court has consistently rejected the contention that "anything which deters illegal searches is thereby commanded by the Fourth Amendment." Alderman v. United States, 394 U.S. 165, 174 (1969); New York v. Harris, 495 U.S. 14, 20 (1990). Instead, in considering whether to apply the exclusionary rule in a particular context, this Court has "weigh[ed] the potential injury to the * * * [proceeding] against the potential benefits of the rule as applied in

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[7] The record supports the conclusion that the suppressed evidence was not needed to determine that petitioner had engaged in a drug transaction in 1988. As the district court stated: "[t]he evidence concerning the 1988 drug transaction is indeed reliable. The officers knew through monitored phone calls that the meeting between Sledge and [petitioner] was for the purpose of doing a drug deal. They observed the transaction occur." United States v. Nichols, 763 F. Supp. at 281.

this context." United States v. Calandra, 414 U.S. at 349; United States v. Leon, 468 U.S. 897 (1984).

In general, the Court has been reluctant to conclude that the purposes of the exclusionary rule would be furthered by applying it in proceedings other than the determination of guilt at a criminal trial. For example, the Court has concluded that the exclusionary rule is inapplicable to grand jury proceedings, Calandra, 414 U.S. at 338; deportation proceedings, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); federal habeas corpus proceedings (where the defendant had a full and fair opportunity to litigate the issue in state court), Stone v. Powell, 428 U.S. 465 (1976); or federal civil tax proceedings, United States v. Janis, 428 U.S. 433 (1976). In each case, the Court's decision rested on the conclusion that the additional deterrent value of applying the exclusionary rule did not justify the substantial costs of applying it in the context under review.

That balance of interests leads to the conclusion that the exclusionary rule should not be extended to sentencing. This Court has recognized that it is a "fundamental" principle that in sentencing an offender, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information he may consider, or the source from which it may come." United States v. Grayson, 438 U.S. 41, 50 (1978), quoting United States v. Tucker, 404 U.S. 443, 446 (1972). Congress has manifested a clear intention to continue the traditional practice of giving the district judge wide access to information. See 18

U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence"). The Sentencing Commission has adopted the same approach in the Sentencing Guidelines. See Sentencing Guidelines § 1B1.4. The traditionally wide latitude given to district judges in considering information relating to the offender and the offense, which is carried forward under the Sentencing Guidelines, is inconsistent with a rule preventing the judge from considering such evidence.[8]

Against the harm that would be caused by removing the authority of the district judge to consider all relevant information in determining punishment, the added deterrent effect from extending the exclusionary rule to sentencing is not significant. Police officers already are deterred from violating the Fourth Amendment by the knowledge that the direct and indirect fruits of such violations will be excluded at the criminal trial. This Court has previously refused to extend the exclusionary rule where it would achieve only "speculative and undoubtedly minimal"

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[8] The Constitution prohibits courts from considering inaccurate information at sentencing. See Roberts v. United States, 445 U.S. 552, 556 (1980); United States v. Tucker, 404 U.S. at 447. There is no suggestion here, however, that consideration of the illegally seized evidence posed any risk of that kind to petitioner. "Physical evidence seized in violation of the Fourth Amendment * * * is inherently reliable." United States v. Tejada, 956 F.2d 1256, 1261 (2d Cir. 1992).

deterrence of Fourth Amendment violations. Calandra, 414 U.S. at 351-352.

Both before and after the Sentencing Guidelines, the courts of appeals have refused to apply the exclusionary rule at sentencing. See United States v. Tejada, 956 F.2d 1256, 1261-1262 (2d Cir. 1992) (Guidelines case); United States v. Lynch, 934 F.2d 1226, 1236-1237 (11th Cir. 1991) (same), cert. denied, 112 S. Ct. 885 (1992); United States v. McCrory, 930 F.2d 63 (D.C. Cir. 1991) (same), cert. denied, 112 S. Ct. 885 (1992); United States v. Torres, 926 F.2d 321 (3d Cir. 1991) (same); United States v. Jessup, 966 F.2d 1354 (10th Cir. 1992) (same; declining to suppress evidence at sentencing that was obtained in violation of state law); United States v. Graves, 785 F.2d 870 (10th Cir. 1986) (pre-Guidelines); United States v. Lee, 540 F.2d 1205 (4th Cir.) (same), cert. denied, 429 U.S. 894 (1976); United States v. Schipani, 435 F.2d 26 (2d Cir. 1970) (same), cert. denied, 401 U.S. 983 (1971). See also United States v. Jewell, 947 F.2d 224, 232 n.11 (7th Cir. 1991) (declining to resolve the issue of whether the exclusionary rule applies at sentencing, because the case was remanded for resentencing).

The holding of this case, which permits a district court to use illegally seized evidence from a prior and unrelated drug transaction in determining where to sentence the defendant within the applicable Guidelines range, is narrower than the rule in those circuits. Although we disagree with the view of the court of appeals that the advent of the Sentencing Guidelines gives law

enforcement officers an added incentive to engage in illegal seizures and that the exclusionary rule should therefore be applied in sentencing when the illegally seized evidence relates to the crime of conviction, Pet. App. 14-17, this case does not squarely present that issue. The illegal seizure here took place in connection with a prior, unrelated investigation and drug transaction. The court of appeals was clearly correct in holding that suppression of that evidence in this case would have little, if any, value in deterring illegal conduct. Id. at 17. Accordingly, there is no plausible claim here that suppression is necessary to deter Fourth Amendment violations.

The decision in this case does not conflict with Verdugo v. United States, 402 F.2d 599, 610-613 (9th Cir. 1968), cert. denied, 402 U.S. 961 (1971). Pet. 23-24. Although the court in that case stated that "illegally seized evidence" must be disregarded "at sentencing [where its use] would provide a substantial incentive for unconstitutional searches and seizures," 402 F.2d at 613, Verdugo has been considerably limited in the Ninth Circuit and now applies only to illegal searches conducted with the "sole object [of] obtain[ing] evidence of a single offense with which defendant is charged." United States v. Vandemark, 522 F.2d 1019, 1022-1025 (9th Cir. 1975) (declining to apply Verdugo to probation revocation proceedings); United States v. Larios, 640 F.2d 938, 942 (9th Cir. 1981) (refusing to suppress evidence at sentencing that was seized under a technically deficient search warrant); see United States v. Robins, 978 F.2d

881, 891 (5th Cir. 1992) (discussing limited scope of Verdugo). Petitioner does not claim, and cannot show, that the search in this case was conducted solely to obtain evidence for use against him at sentencing.

3. Petitioner contends (Pet. 27-34) that the district court erred in several respects in computing his offense level under the Sentencing Guidelines. Specifically, he argues that the district court erred (1) by increasing his offense level because a firearm was used in the charged offense; (2) by increasing his offense level because he was involved in the uncompleted March 1990 drug deal; and (3) by refusing to decrease his offense level for acceptance of responsibility. Those claims were correctly resolved against petitioner by both the district court and the court of appeals, and further review of those factbound issues is unwarranted.

a. With respect to the firearm issue, Sentencing Guidelines § 2D1.1(b)(1) requires a two-level increase in a defendant's offense level for possession of a dangerous weapon, including a firearm. In addition, Sentencing Guidelines § 1B1.3(a)(1)(B) provides that a defendant's offense level is to be based not only on his own conduct, but, in the event of jointly undertaken conduct, on those "reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." Here, the courts below properly found that petitioner could reasonably foresee that Harkins would carry a firearm to his rendezvous with the agents. When Harkins asked petitioner

whether he should carry a firearm to the meeting, petitioner told him to use his discretion, and the arresting agents found a shoulder holster in petitioner's truck. Moreover, petitioner had previously purchased a number of firearms from Harkins that were linked to their joint drug dealing activities. Pet. App. 3, 18-19.

b. With respect to the court's consideration of the March 1990 drug deal, Application Note 12 to Sentencing Guidelines § 2D1.1 provides that quantities and types of drugs not specified in the charged offense may nevertheless be included in the defendant's offense level if they constitute relevant conduct under Sentencing Guidelines § 1B1.3. In addition, if a drug negotiation is unsuccessful, the district court will include the amount of drugs under negotiation unless the defendant did not intend to produce and was not reasonably capable of producing that amount. In this case, the uncompleted March 1990 cocaine negotiation was part of the same scheme as the charged offense, because both involved the same sellers, the same buyers, the same drug, and the same objective. Furthermore, petitioner fully intended to buy five kilograms of cocaine from the agents and had enough money to pay for it; the deal was called off only when the agents refused to give Harkins one kilogram for testing without payment. Accordingly, the March 1990 deal was properly included in computing petitioner's offense level.

c. With respect to the district court's refusal to award petitioner credit for acceptance of responsibility, Sentencing

Guidelines § 3E1.1 authorizes a district court to decrease the defendant's offense level by two levels if the defendant "clearly demonstrates acceptance of responsibility for his offense." The Guidelines in effect at the time of petitioner's crime stated that acceptance of responsibility includes a truthful admission of guilt not only to the charged offense but to related conduct. See Application Note 1(c) to Sentencing Guidelines § 3E1.1 (1989 ed).[9]

At the sentencing hearing, petitioner "denied involvement in Harkins' attempt to purchase the five kilograms of cocaine in the Spring of 1990, despite persuasive evidence to the contrary." Pet. App. 22. Because petitioner denied his role in his related drug association with Harkins, he did not fully accept responsibility for his related conduct; thus, the courts below properly concluded that petitioner was not entitled to credit for acceptance of responsibility.

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[9] Currently, Application Note 1(a) provides that a defendant who falsely denies relevant conduct has acted inconsistently with accepting responsibility.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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